Supreme Court, U. S.
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No. 76-715

In the Supreme Court of the United States

OCTOBER TERM, 1976

MARTIN L. VAN WINKLE, PETITIONER

v.

JOHN L. McLUCAS, SECRETARY OF THE AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
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Petitioner, a civilian Air Force employee awarded back pay for improper dismissal, contends that he is entitled to pre-judgment interest at the rate of 8 percent per annum.

Petitioner was employed as an auditor at Wright-Patterson Air Force Base, Ohio. As a result of a shoplifting incident occurring on November 1, 1969, petitioner was removed from his civilian employment for theft of government property, deliberate withholding of facts in connection with an official investigation, and failure to comply with written instructions of the Base Commander (Pet. App. 2a-3a). On administrative appeal, it was determined that petitioner's removal was procedurally invalid, and he was reinstated with back pay on May 13, 1971. Immediately following petitioner's reinstatement, the removal process was reinitiated on grounds relating to

the same incident. Petitioner again was removed on November 19, 1971, and he appealed. This time the Air Force sustained the removal, as did the Civil Service Commission Regional Office and the Civil Service Commission Board of Appeals and Review.

Petitioner then brought this action in the United States District Court for the Southern District of Ohio. The district court held that the Air Force had not substantially complied with the procedural requirements of its regulations (Pet. App. 10a). The court ordered that petitioner be reinstated and awarded back pay with prejudgment interest at the rate of 8 percent (*ibid.*).[1]

The government appealed from the award of prejudgment interest. The court of appeals reversed, holding that the Back Pay Act, a waiver of sovereign immunity that must be strictly construed, does not authorize an award of interest (Pet. App. 11a-13a).

The judgment of the court of appeals is correct. Petitioner contends (Pet. 8-13) that the Back Pay Act and its implementing regulations should be construed as providing implied authority for the award of interest.[2] This Court, however, has repeatedly held that in the absence of an express statutory or contractual provision, interest cannot be recovered against the United States.

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[1]No post-judgment interest was awarded.

[2]The Back Pay Act, 5 U.S.C. 5596(b)(1), provides for the award of "an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned * * * ."

The implementing regulations, 5 C.F.R. 550.804(b)(7), provide, *inter alia*, that this amount shall be computed to include "[a]ny other changes which would affect the amount of pay, allowances, differentials or leave which the employee would have earned had it not been for the unjustified or unwarranted personnel action."

E.g., *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 49; *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 588. Petitioner cites no authority to the contrary.[3] Since the Back Pay Act does not affirmatively and unambiguously provide for interest, it cannot support an interest award against the government. Cf. *United States* v. *Testan*, 424 U.S. 392.

Petitioner also claims interest based on the alleged "bad faith" of the government (Pet. 13-16). However, the record does not support his allegation that any Air Force officials intentionally violated any regulations, and the district court at no point found an intentional violation. Petitioner infers bad faith from certain findings of the district court (Pet. 14), but bad faith may not be so inferred "unless the findings are so clear on the subject as to cause such inference to be plain beyond controversy." *Ripley* v. *United States*, 220 U.S. 491, 496. That is not the case here. In any event, there is no support for petitioner's contention that bad faith on the part of individual officials could cause a waiver

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[3]Petitioner suggests (Pet. 10) that the Civil Service Commission has interpreted the Back Pay Act to provide for interest. This is not the case. The Commission's *Federal Personnel Manual* (FPM Supplement 990-2, Book 550, Subchapters S8-5 BACK PAY— CORRECTIVE ACTION, and S8-7 BACK PAY— AUTHORIZED DEDUCTIONS), at no point provides for interest. On the contrary, the *Manual* states:

> When an employee has been separated from his position by an unjustified or unwarranted personnel action which is corrected, the amount of his entitlement is the difference between the amount his Government income should have been and the amount which he actually earned in an employment obtained to take the place of his Government employment. [*Id.* at 550-61.]

The *Manual* also states:

> Back pay includes only that salary for the period of separation or suspension, minus amounts earned by other employment. [*Id.* at 550-63.]

The sample computation omits any award of interest (*id.* at 550-64).

of sovereign immunity with regard to the payment of interest.[4] See *J. L. Simmons Company* v. *United States*, 412 F. 2d 1360, 1389 (Ct. Cl.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[4]Petitioner cites (Pet. 15-16) *Aird* v. *United States*, 116 F. Supp. 281 (E.D. Pa.), and *Terry* v. *United States*, 101 F. Supp. 165 (Ct. Cl.), but those cases involved statutes that specifically provided for interest. See 61 Stat. 510 (*Terry*) and 46 U.S.C. 743 (*Aird*).